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November 23, 2005

**VIA ELECTRONIC FILING**

Magistrate Judge Michael L. Orenstein
U. S. District Court
Eastern District of New York
Long Island Courthouse
100 Federal Plaza
Central Islip, NY 11722-4438

Re: **S & L Vitamins, Inc. v. Australian Gold, Inc.**
05 CV 1217 (JS)(ML)

Dear Magistrate Judge Orenstein:

We want to respond to opposing counsel scurrilous letter dated November 21, 2005 (the "Letter") concerning the manner in which we have conducted discovery with S & L Vitamins' suppliers. The Letter is laced with misrepresentations, false accusations and unsubstantiated conclusions. Please allow this letter to set the record straight.

S & L Vitamins filed this lawsuit seeking declaratory judgment that its purchase and sale of Australian Gold tanning lotions over the internet did not constitute trademark infringement or tortious interference with Australian Gold's distribution system. As the Court will recall, S & L Vitamins refused to disclose the source of its suppliers. At the first pretrial conference last July, this Court ordered S & L Vitamins to disclose its sources pursuant to the terms of a protective order. The Court stated that without disclosing these sources, S & L Vitamins had no case because its claims were not ripe. Reluctantly, S & L Vitamins agreed to do so, but not until after we wrote the Court seeking its assistance in obtaining this disclosure.

Australian Gold has the right to conduct discovery to verify S & L Vitamins' story that it only buys from these suppliers. As part of our due diligence, we served subpoenas on all suppliers identified. Among other things, we requested documents related to communications, sales, purchase orders, invoices, and e-mails between these suppliers and S & L Vitamins. To date, one supplier has responded by telephone, but still has not produced any documents. Another supplier has completely ignored our efforts to communicate with it, forcing us to file a Motion to Compel. Yet another supplier scribbled a handwritten response, gave us a phone number and invited us to call its representative. We did so and were informed that the supplier had no business records related to its transactions with S & L Vitamins because all of its invoices are disposed of after the transactions are complete. During this call, we also confirmed that most of the orders were placed over the telephone.

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While much of this supplier's story does not seem plausible, we obtained this supplier's agreement that it would not destroy documents in the future and that it would produce them to us. We also sent this supplier a second subpoena seeking additional information based upon our telephone conversation. Of particular importance, we requested the telephone records which, if what the supplier told us was true, would document the telephone calls between S & L Vitamins and this supplier. We also sought documents related to communications and agreements between this supplier and Australian Gold as we believe that Australian Gold and this supplier are in privity of contract and that Australian Gold may have legal rights that this supplier is violating. The deadline to respond to the second subpoena was November 14, 2005. Not surprisingly, this supplier ignored the subpoena and has not responded. We also anticipate having to file a motion to compel against this supplier because of its decision to ignore a valid subpoena.

Interestingly, none of the suppliers have formally objected to the scope or breadth of the subpoenas, nor have they moved to quash the subpoenas. It is S & L Vitamins' counsel who has objected to the subpoenas. In the Letter, S & L Vitamins' counsel directly attacks our integrity and accuses us of, at least indirectly, violating the terms of the protective order. When, in fact, we have gone to great lengths to comply with the terms of the protective order, as evidenced by our recent "sealed" filings with the Court.[1]

It is absolutely untrue that Australian Gold's counsel threatened any of S & L Vitamins' suppliers. We never stated that Australian Gold would cut them off or revoke any rebate checks. All allegations of this nature are unfounded. In an effort to obtain one of the supplier's response, counsel did state that if the supplier chose to ignore the subpoena, that it would be forced to take the matter before the Court and seek sanctions. This statement is absolutely true as there is a pending motion to compel against this supplier for his failure to respond to the subpoena.

Opposing counsel seems to argue that since we have engaged in discovery with these suppliers (something that we have a right to do) and have met strong resistance from these suppliers, our efforts to compel discovery constitute a violation of the protective order. If the suppliers will not respond to the subpoenas voluntarily, then Australian Gold has no choice but to take this matter before the Court. These actions certainly do not violate the letter or the spirit of the protective order. These suppliers must respond to discovery and must not ignore valid court subpoenas.

Australian Gold welcomes the opportunity to discuss these issues with the Court. We are likewise troubled by the suppliers' uniform refusal to respond to the subpoenas. We would like to explore to what extent there has been a concerted effort to thwart our discovery efforts and intend to request that the Court issue orders compelling discovery against all persons not in compliance with all outstanding discovery requests and subpoenas.

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[1] It should also be noted that S & L Vitamins has failed to produce a single document. On November 7, 2005, S & L Vitamins responded to our requests for production and stated that the documents would be made available. Despite our repeated requests to review the documents and promises that the documents will be made available, counsel has still not produced the documents for our review.

Finally, we would like to address the upcoming November 30, 2005 deadline to amend the pleadings and add additional parties. We have been diligent in our discovery to meet all Court imposed deadlines; however, as discussed above, S & L Vitamins and its suppliers have either delayed or refused to respond to our discovery demands, which has severely hampered our discovery efforts. Therefore, we are requesting an extension of time for the November 30, 2005 deadline to add additional parties until such time that these suppliers and S & L Vitamins cooperate in discovery.

Sincerely,

Francis Earley

Francis J. Earley

cc: Scott D. Matthews